

IN THE  
COURT OF CRIMINAL APPEALS OF TEXAS

RUSSELL LAMAR ESTES,  
*APPELLANT*

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FILED  
COURT OF CRIMINAL APPEALS  
11/9/2016  
ABEL ACOSTA, CLERK

v.

NO. PD-0429-16

THE STATE OF TEXAS,  
*APPELLEE*

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STATE'S BRIEF ON THE MERITS OF  
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW  
§ § §

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THE STATE OF TEXAS,  
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STATE'S BRIEF ON THE MERITS OF  
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This brief is filed on behalf of the State of Texas by Sharen Wilson, Criminal District Attorney of Tarrant County. The appellant is challenging the Second Court of Appeals' decision to review his equal protection claim under the rational basis test and its decision to remand his sexual assault convictions for a new punishment hearing rather than order a new trial or dismissal of prosecution.

STATEMENT OF PROCEDURAL HISTORY

The appellant was convicted by a jury on five counts of sexual assault. (C.R. I:236-40; R.R.V:195). The jury further found that his sentencing range

should be enhanced to a first-degree range under Texas Penal Code section 22.011(f)<sup>1</sup>, and sentenced him to twelve years' confinement for each offense. (C.R. I:243-44, 254-58; R.R. VI:104).<sup>2</sup>

On March 24, 2016, the Court of Appeals held that the enhancement of the appellant's sentencing range for sexual assault to a first-degree felony under Texas Penal Code section 22.011(f) violated his equal protection rights because it penalized him differently than a similarly-situated non-married defendant without a rational basis for doing so. See [\*Estes v. State\*, 487 S.W.3d 737, 750 \(Tex. App. - Fort Worth 2016, pet. granted\)](#). The Court of Appeals remanded the appellant's sexual assault convictions for a new punishment proceeding with a second-degree felony sentencing range. See [\*Estes v. State\*, 487 S.W.3d at 750, 762](#).<sup>3</sup>

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1 The penalty level for sexual assault of a child may be enhanced to a first-degree if it is alleged and proved at trial that:

The victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

**[Tex. Penal Code §22.011\(f\)](#).**

2 The appellant was also convicted on two counts of indecency with a child by contact for which he received ten years' community supervision for each offense. (C.R. I:241-42, 259-60; R.R. V:195, VI:104).

3 The Court of Appeals did not address the appellant's complaint that his sentencing range enhancement violated his due process rights, and overruled his remaining points of error challenging his sexual assault and indecency

On September 14, 2016, this Court granted the appellant's petition for discretionary review to determine whether the Court of Appeals properly reviewed his claim under the rational basis test and whether the trial court properly remanded the case only for a new punishment proceeding rather than a new trial or dismissal of prosecution.<sup>4</sup>

### ISSUES PRESENTED

1. Is the rational basis test the proper test for determining whether the appellant's equal protection rights were violated by the application of sentencing enhancement provision set out in Texas Penal Code section 22.011(f) to him?
2. Is a new punishment hearing the proper remedy after determining that the application of this sentencing enhancement provision violated the appellant's equal protection rights?

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convictions. See [Estes v. State](#), 487 S.W.3d at 746-50. The Court of Appeals also left intact the appellant's sentencing for his two indecency with a child convictions. See [Estes v. State](#), 487 S.W.3d at 743.

- 4 On this same date, this Court granted the State's petition for discretionary review to determine whether the Court of Appeals properly concluded that there was no rational basis for the appellant receiving disparate treatment of an enhanced sentencing range due to his marital status or the victim's age.

## SUMMARY OF THE ARGUMENT

The Court of Appeals properly applied the rational basis test in evaluating the appellant's equal protection claim because marital status is not a suspect class and this statutory application did not interfere with his fundamental rights.

The Court of Appeals properly remanded the appellant's case for a new punishment hearing after determining that the enhancement of his sentencing range violated his equal protection rights.

## ARGUMENT

### **A. Proper Equal Protection Test**

The Equal Protection Clause requires that "all persons similarly situated shall be treated alike" under the law. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013); **U.S. Const. amend. XIV**. This protection, however, must coexist with the practical necessity that most legislation classifies for one purpose or another with resulting disadvantage to various groups or persons. *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996).

Equal protection challenges are examined under either the strict-scrutiny test or the rational-basis test. *City of Cleburne*, 473 U.S. at 439–40, 105 S.Ct. at 3254; *Cannady v. State*, 11 S.W.3d 205, 215 (Tex. Crim. App. 2000). Strict scrutiny applies if a law discriminates against a suspect class or interferes with a fundamental right. *Cannady v. State*, 11 S.W.3d at 215. Suspect classes typically involve classes of individuals who have historically suffered discrimination or involve immutable characteristics such as race, gender, disability, alienage or national origin. *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254; *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976). Where no suspect classification or fundamental rights violation is involved, the State may treat different classes of persons in different ways so long as the difference is rationally related to a valid public purpose. *Eisenstadt v. Baird*, 405 U.S. 438, 447, 92 S.Ct. 1029, 1035, 31 L.Ed.2d 349 (1972); *State v. Rosseau*, 396 S.W.3d at 557 n.7.

In determining whether the application of section 22.011(f) violated the appellant's equal protection rights, the Court of Appeals did not address whether the strict scrutiny test applied because it found a violation under the rational basis test. *Estes v. State*, 487 S.W.3d at 747 n.8. Nevertheless, the

rational basis test was the proper analysis because the appellant did not fall within a suspect class and that this statutory application did not interfere with a fundamental right.

The appellant claimed that the application of section 22.011(f) violated his equal protection rights by penalizing him for being married and by treating him differently from an unmarried person. See *Estes v. State*, 487 S.W.3d at 746. Marital status is not a suspect classification requiring strict scrutiny. *Califano v. Jobst*, 434 U.S. 47, 53–54, 98 S.Ct. 95, 99, 54 L.Ed.2d 228, 234–235 (1977); *James v. State*, 772 S.W.2d 84, 92 (Tex. Crim. App. 1989). See also *Glossip v. Missouri Dept. of Transp. and Highway Patrol Employee's Retirement System*, 411 S.W.3d 796, 805 (Mo. 2013) (United States Supreme Court has never held that marital status is a classification triggering heightened equal protection scrutiny), *citing Eisenstadt v. Baird*, 405 U.S. at 446–47, 92 S.Ct. at 1035 (invalidating a Massachusetts law denying unmarried persons access to contraceptives for want of a rational basis).

Likewise, an adult has no fundamental liberty interest in having a sexual relationship with a child. See *Arias v. State*, \_\_ S.W.3d \_\_, 2016 WL 4772352, at \*3 (Tex. App. - San Antonio September 14, 2016, no pet.) (no fundamental liberty interest in having a consensual intimate relationship with

a child between fourteen and seventeen years of age); *Byrne v. State*, 358 S.W.3d 745, 751 (Tex. App. – San Antonio 2011, no pet.) (federal constitution does not grant a fundamental right to have sex with minors). Thus, strict scrutiny review does not apply to any equal-protection challenge based on a victim being younger than seventeen years of age. See *Arias v. State*, 2016 WL 4772352, at \*3.

In sum, the Court of Appeals properly applied the rational basis test because marital status is not a suspect class and this statute’s application did not interfere with the appellant’s fundamental rights.

## **B. Proper Remedy**

A defendant has no vested right to an entirely new trial when errors relating only to the assessment of his punishment are committed. *Grimes v. State*, 807 S.W.2d 582, 587 (Tex.Crim.App.1991); *State v. Stewart*, 282 S.W.3d 729, 740 (Tex. App. - Austin 2009, no pet.). Error regarding a subject that a jury only considers during the punishment phase of a trial is “error affecting punishment only,” unless the defendant produces evidence showing that the error necessarily produced a jury biased against the defendant on the issue of guilt. *Ransom v. State*, 920 S.W.2d 288, 298 (Tex. Crim. App. 1994), *cert.*

*denied*, 519 U.S. 1030, 117 S.Ct. 587, 136 L.Ed.2d 516 (1996). If no such evidence is produced, the cause should be remanded for a new punishment hearing. *Ransom v. State*, 920 S.W.2d at 298; **Tex. Code Crim. Proc. art. 44.29**.

Even though the jury answered the section 22.011(f) special issue as part of the guilt/innocence jury charge, the impact of its decision did not occur until the punishment phase when the appellant faced an enhanced first-degree sentencing range of five to ninety nine years' or life confinement for his sexual assault offenses. (C.R. I:243, 254-58).<sup>5</sup> Understanding this impact comports with the appellant's actual appellate complaint: the application of section 22.011(f) to him **punishes** him for being married in violation of his due process and equal protection rights. See *Estes v. State*, 487 S.W.3d at 746 (emphasis added). Moreover, the appellant makes no showing how the inclusion of the **section 22.011(f)** special issue caused undue bias against him on the issue of his guilt.<sup>6</sup>

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5 Defendants convicted of sexual assault normally face a sentencing range of two to twenty years' confinement. See **Tex. Penal Code §12.33(a)**.

6 As the Court of Appeals aptly noted, the appellant did not contest the sufficiency of the evidence to support his second-degree felony convictions for sexual assault of a child, and the violation of the appellant's constitutional rights related only to an element that raised the offense to a first-degree felony level and not to an element of the actual criminal offense of sexual

The appellant likens his situation to a prosecution unconstitutional from its inception which would require a dismissal of prosecution. See e.g. *Ex parte Perry*, 483 S.W. 3d 884, 918 (Tex. Crim. App. 2016) (application of government coercion statute to veto threats is unconstitutionally broad and violates the First Amendment); *Long v. State*, 931 S.W.2d 285, 297 (Tex. Crim. App. 1996) (stalking statute facially unconstitutional due to vagueness). However, unlike *Perry* or *Long*, the Court of Appeals' equal protection decision herein does not make the appellant's sexual assault prosecution void from its inception; it only voids the enhancement of his sentencing range. See *Estes v. State*, 487 S.W.3d at 750.

A sentence that is outside the maximum or minimum authorized by law is an illegal sentence, and is considered a void sentence. *State v. Marroquin*, 253 S.W.3d 783, 784-85 (Tex. App. - Amarillo 2007, no pet.), citing *Mizell v. State*, 119 S.W.3d 804, 805 (Tex. Crim. App. 2003), and *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001). When the appellate court is dealing with a void sentence, the only action available is to remand the case to the trial court for a new trial on the issue of punishment. *State v. Marroquin*, 253 S.W.3d at 785, citing *Ex parte Johnson*, 697 S.W.2d

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assault. See *Estes v. State*, 487 S.W.3d at 750.

605, 607 (Tex. Crim. App. 1985). Thus, after determining that the appellant suffered an equal protection violation affecting his punishment, the Court of Appeals properly remanded his case for a new punishment hearing. See Tex. Code Crim. Proc. art. 44.29(b).<sup>7</sup>

### CONCLUSION

The Court of Appeals properly applied the rational basis test rather than the strict scrutiny test in considering the appellant's equal protection challenge because marital status is not a suspect class and he has no fundamental right to sexual relations with a minor child.

The Court of Appeals ordered the proper remedy - remand for a new punishment hearing - after determining that the application of section 22.011(f) herein to enhance the appellant's sentencing range violated his equal protection rights..

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7 An undue remedy expansion to a new trial or a dismissal of prosecution for a violation that only impacted the appellant's punishment would give him an "unjust windfall". See *Estes v. State*, 487 S.W.3d at 750 citing *Thornton v. State*, 425 S.W.3d 289, 298-300 (Tex. Crim. App. 2014). Such a windfall is unnecessary given the optional remedy of a new punishment hearing with the appropriate sentencing range.

PRAYER

The State prays that the appellant's first-degree felony sentences for sexual assault be reinstated or, alternatively, affirm the Court of Appeals' decision to remand this case for only a new punishment hearing with a second-degree sentencing range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

True copies of the State's brief on the merits of the appellant's petition for discretionary review have been electronically served on opposing counsels, the Hon. Brian Salvant ([brian@salvantlawfirm.com](mailto:brian@salvantlawfirm.com)) and the Hon. Adam L. Arrington ([AdamLArrington@gmail.com](mailto:AdamLArrington@gmail.com)), 610 E. Weatherford Street, Fort Worth, Texas 76102, on this, the 9th day of November, 2016.

/s/ Steven W. Conder  
STEVEN W. CONDER

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains approximately 1505 words, excluding those parts specifically exempted by Tex. R. App. P. 9.4(i)(1), as computed by Microsoft Office Word 2010 - the computer program used to prepare the document.

/s/ Steven W. Conder  
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